order to succeed in this case where the plaintiff had obtained the interlocutory judgment regularly the applicants must satisfy the court as to the merits of their affidavit and that they had a reasonable excuse for not entering appearance.

The facts deposed in paragraph 6 and 7 of the joint affidavit dated 14th March 1968 (enclosure 13) are not from the personal knowledge of the deponents; they are merely statements of information or belief. Under the heading "Contents of Affidavit" at page 120 of the *Basic Rules of the Supreme Court*, 2nd Edition, by Lewis F. Sturge, it is stated that "affidavits shall be confined to such facts as the witness is able of his own personal knowledge to prove. Provided that in interlocutory proceedings . . . . the affidavit may contain statements of information or belief, with the sources and grounds thereof." In this case the sources and grounds of the statements of information or belief have not been disclosed in the affidavit, and I therefore fail to find any merits in the affidavit. There is also no reasonable excuse for the applicants not to enter an appearance. In the event, the applicantion was dismissed with cost.

Application dismissed.

Solicitors: *Lim Kean Siew & Co.; Dharmananda & Co.*

PARAMOO v. ZENO LTD.

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) May 13, 1968]

[K.L. — Federal Court Civil Appeal No. X.35 of 1967]

Companies — Charge on land — Failure to register — Charge registered with Registrar of Companies — Companies Ordinance, 1940, s 80.

Land Laws — Caveat — Lien — Caveat avoided for non compliance — Whether lien avoided also — Land Code (F.M.S. Cap. 138), ss. 96, 129, 134, 166 & 167.

This was an appeal by the second defendant against the judgment of Raja Azlan Shah J. reported in [1967] 2 M.L.J. 104. It was contended on appeal that (a) as the charge was not enforceable as such, the lien was not enforceable either and (b) the lien did not comply with the law because there was no intention to create a lien as required by section 134 of the Land Code and the caveat lodged did not state the nature of the interest in the land caveated as required by section 167 of the said Code and the ground upon which the claim was founded.

Held, dismissing the appeal: (1) the Land Code makes it quite clear that a charge is quite distinct from a lien. A lien under the Code is a statutory lien and it has an independent existence apart from a charge so that if a charge is avoided for non-compliance with the law, the lien is not avoided also provided of course it complies with the law;

(2) clause 6 of the mortgage and general charge clearly showed an intention to create a lien. An examination of the caveat showed the nature of the interest in the land caveated and the ground upon which the claim was founded.

Cases referred to:—

(1) *In re Molton Finance Ltd.* [1967] 3 W.L.R. 1561.

(2) *Palaniappa Chetty* v. *Dupire Brothers & Anor* (1919), 1 F.M.S.L.R. 370.

(3) *Registrar of the Supreme Court* v. *Kong Peng Kee & Ors.* (1922), 3 F.M.S.L.R. 80.

(4) *L.R.M. Raman Chetty* v. *K.V.A.L. Muthiah Chetty* (1923), 3 F.M.S.L.R. 177.

The following cases were also cited: (1) *Great Northwest Central Railway Co.* v. *Charlebois* [1899] A.C. 114; (2) *In re Jon Beaufort London Ltd.* [1953] 1 All E.R. 634; (3) *Re White Rose Cottage* [1965] 1 All E.R. 11; (4) *In re Monolithic Building Co.* [1951] 1 Ch. 643; (5) *Edwards* v. *Edwards* (1876), 2 Ch. D. 291 and (6) *Connecticut Fire Insurance Co.* v. *Cavanagh* [1892] A.C. 473, 480.

FEDERAL COURT.

C. Thambiah for the appellant.

Chooi Mun Sou for the respondents.

Cur. Adv. Vult.

Suffian F.J.: In the lower court the plaintiffs (now respondents) claimed against the Prefabricated Construction Co. (Malaya) Ltd., the first defendants (not appealing), and against P. Paramoo, the second defendant (now appellant).

The facts are as follows. The first defendants are registered proprietors of land held under E.M.R. 4031 for Lot 703 in the Mukim of Bukit Raja, in the District of Klang. On 16th February, 1962, a resolution (Exhibit P.1) was passed by the plaintiffs. It authorised the company, first, to affix their seal to a memorandum of charge created by the first defendants in favour of the plaintiffs to secure the repayment of $75,000 lent to the plaintiffs and, secondly, to approve the sum of $75,000 lent to the first defendants between October 1961 and February 1962. On the same day the first defendants executed a "mortgage and general charge" (Exhibit P.2) in favour of the plaintiffs to secure repayment of the principal sum of $75,000 lent to the first defendants with interest thereon at 5% per annum. The charge was never registered in the Land Office though it was registered under section 80 of the Companies Ordinance No. 49 of 1940 on 9th March, 1962.

It was a term of the charge that (clause 6) "the mortgagor (first defendants) further hereby deposit the title for the land concerned with the lender (the plaintiffs) as security for principal and interest and the lender may lodge a caveat with the Collector of Land Revenue to create a lien." A caveat was lodged with the Collector of Land Revenue, Klang, on 23rd April, 1962.

On 31st October, 1963, the second defendant, a contractor, obtained judgment in the sum

of $20,514.87 and interest thereon at 6% per annum and costs against the first defendants in another suit, *viz.*, Civil Suit No. 261 of 1962.

On 14th November, 1963, the second defendant obtained a prohibitory order against the land and presented it for registration with the Collector of Land Revenue under the Land Code. The order provided that it was subject to caveats and prohibitory orders.

The second defendant then obtained an order of the court dated 6th February, 1964, for the sale of the land by public auction at a reserve price of $25,000.

On 11th April, 1964, the plaintiffs brought this action against both defendants, claiming as against the first defendants:—

(a) judgment in the sum of $82,500;

(b) interest at 5% per annum from the 16th of February, 1962, to the date of judgment; and

(c) interest on the judgment sum at 6% per annum from the date of judgment to the date of recovery;

and as against the second defendant:—

(d) a declaration that the plaintiffs' lien on the land has priority of right, claim and interest over that of the second defendant's prohibitory order;

(e) an order to set aside the order of sale dated the 16th of February, 1964, or alternatively that the land be auctioned with a reserve price of not less than $90,000 and that the proceeds of sale be deposited in court, pending disposal of this suit;

(f) costs in this suit; and

(g) that they be at liberty to apply.

The first defendants did not defend and judgment in default was obtained against them.

The second defendant contested the suit and prayed that the plaintiffs' claim be dismissed and the caveat be removed, claiming that the plaintiffs' lien was void.

In the event Raja Azlan Shah J. gave judgment:—

(a) against the first defendants in the sum prayed with interest at 6% per annum from the date of judgment to the date of realization;

(b) the plaintiffs' lien has priority over the second defendant's prohibitory order;

(c) that the land should be sold by public auction;

(d) the registrar to give the necessary directions in regard to the sale of the land; and

(e) costs.

The second defendant appeals.

It is convenient now to state the law applicable.

First, there is section 80 of the Companies Ordinance No. 49 of 1940 which reads:—

"(1) Subject to the provisions of this Part of this Ordinance, every charge created after the fixed date by a company registered in the Federation and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the registrar for registration in manner required by this Ordinance within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to the following charges:—

.....

(d) a charge on land, wherever situate, or any interest therein;

.....

(3) to (9) *(not relevant).*

(10) In this Part of this Ordinance:—

(a) *(not relevant);*

(b) the expression 'the fixed date' means in relation to the charges specified in paragraphs (a) to (f), both inclusive, of subsection (2) of this section, the tenth day of December, nineteen hundred and fifteen, . . .;

(c) a charge on land situate in any Malay State, . . . shall be deemed to be created:—

(i) . . . at the time when the charge is registered pursuant to section 90 of the Land Code of the Federated Malay States or the corresponding provision of the Land Enactment of the Malay State concerned;

(ii) *(not relevant).*"

Charges are dealt with in the F.M.S. Land Code. Sections 129 and 96 thereof read:—

"129. Whenever any land is intended to be charged or made security in favour of any person the proprietor and the chargee shall execute a memorandum of charge in one of the Forms in Schedule XXIV, which memorandum shall for description of the land refer to the register document of title therefor and the proprietor or the chargee shall present the same together with the issue document of title."

"96. No instrument until registered in manner hereinbefore prescribed shall be effectual to . . . render any land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed . . ., the land shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument or by this Enactment declared to be implied in instruments of a like nature."

Liens are dealt with in section 134 of the Land Code which reads:—

"134. (i) When a lien is intended to be created over any land the proprietor may deposit his grant, lease of

State land, certificate of title or extract from the mukim register, and the person with whom the same has been deposited may present a caveat. Upon registration of such caveat the lien shall be created. When the holder of such lien has obtained a judgment of court for the actual sum due he shall be entitled to apply for and obtain forthwith an order for the sale of the land.

(ii) The issue document of title shall be delivered with the caveat upon presentation thereof."

A lien, it will be noticed, should be caveated. Sections 166 and 167 of the Land Code deal with caveats. They read:—

"166. The grantor of any instrument of trust or a beneficiary or a guardian or next friend of any minor beneficiary or a trustee or any person claiming title to or registrable interest in land may present a caveat to the effect that such land shall not be transferred, charged or leased by the proprietor either

(a) absolutely, or

(b) except in such manner and to such extent as in such caveat may be expressed, or

(c) until notice shall have been served on the caveator, or

(d) unless the transfer, charge, or lease be expressed to be subject to the claim of the caveator as expressed in such caveat, or

(e) except subject to any conditions expressed in such caveat.

167. A caveat shall state the nature of the interest in the land and the ground upon which the claim is founded shall be verified by the affirmation of the caveator or his agent, shall contain an address within the Federated Malay States at which notices may be served, and may be in the Form in Schedule XXXV."

It is to be noted that we are not concerned with the dispute between the plaintiffs and the first defendants. The court must accept that as between them the first defendants had deposited their title deed with the plaintiffs, and there is a judgment in favour of the plaintiffs against the first defendants.

We are here concerned only with the dispute between the plaintiffs and the second defendant.

It is not disputed that the plaintiffs failed to register the charge under the Land Code, though they registered it under section 80 of the Companies Ordinance. The plaintiffs do not, however, found their claim on the charge. They found it on the lien.

The second defendant, however, says that if the charge is not enforceable as such, the lien is not enforceable either and he cites *In re Molton Finance Ltd.*[1] There a firm of stockbrokers lent £15,000 to a company. In order to secure repayment the company gave to the stockbrokers subcharges on properties and deposited deeds and documents with them "to the intent that the same may be equitably charged with the repayment" of the £15,000. The charges created were not registered under section 95(1) of the English Companies Act, 1948. It was held that as the charge was avoided for non-registration, the contractual right to the retention of the deed and documents was also lost. Lord Denning M.R. said at page 1565:—

"It seems to me that when an equitable mortgage or charge is created by deposit of title deeds, there is an implied contract that the mortgagee or chargee may retain the deeds until he is paid. This implied contract is part and parcel of the equitable mortgage or charge. It is not a separate legal or common law lien. It has no independent existence apart from the equitable mortgage or charge. When the mortgage or charge is avoided for non-registration, then everything which is ancillary to it is avoided also. So this contractual right of retention is avoided too."

I do not think that that case applies.

The Land Code makes it quite clear that here a charge (we have no mortgage in the Malay States) is quite distinct from a lien. A charge is born in the manner given in section 129, and the chargee's rights are as given in the Code. A lien on the other hand is born in the manner given in section 134 and the lien-holder's rights are given in the same section.

Section 134 was originally section 80 of the Registration of Titles Enactment No. 13 of 1911. In *Palaniappa Chetty* v. *Dupire Brothers & Anor.*[2] Earnshaw J.C. said at page 373:—

"A lien is one and a special form of security. In fact 'security' is the genus of which 'lien' is a species. . .

It must be recognised that section 80 of the Registration of Titles Enactment introduces an exemption from the general principles of registration of title.

That section stands entirely by itself. It is an exception. It does not harmonize with the other provisions of the Enactment, and it might well be argued that it conflicts with or contradicts previous provisions of the same Enactment.

When however it is once seen that it is an exception specially made for a particular purpose, *viz.*, that of enabling business men to raise money on loan speedily, as for instance by getting an overdraft from one's banker on depositing 'a grant or certificate of title' and complying with the other simple provisions laid down in section 80 it is easy to interpret. As is said on page 197 of *'Innes* on Registration of Title' it seems to be a departure from a scientific and rigid scheme of registration which the complex conditions of modern commercial life have made necessary here as in other countries where registration of title is in force.

In this statement I would only substitute for the words 'seems to be' the words 'is in fact'."

Here a lien is a separate legal — statutory — lien. It has an independent existence apart from a charge. So if a charge is avoided for non-compliance with some law or other, the lien (not being ancillary to it) is not avoided also, provided of course it complies with the law.

Liens over land owned by a company do not have to comply with section 80 of the Companies Ordinance, because that section applies only to charges. Charges are not liens. The charges subject to section 80 are enumerated in subsection (2) and liens are not included in the list.

But the second defendant says this lien does not comply with the law because, first, there was no intention to create a lien, as required by section 134 of the Land Code, and, secondly, the caveat lodged did not, as required by section 167, state the nature of the interest in the land caveated and the ground upon which the claim was founded. I am of the opinion that these objections also fail, because clause 6 of the so-called mortgage and general charge (reproduced above) clearly showed an intention to create a lien. A copy of the caveat lodged is exhibit P.4. To the original was attached a copy of exhibit P.2. Reference to these two exhibits clearly shows that the caveat stated the nature of the interest in the land caveated and the ground upon which the claim was founded.

If the lien is in conformity with section 134 of the Code, what are the rights of its holder, the plaintiffs, as against unsecured creditors like the second defendant?

Section 80 of the Registration of Titles Enactment, 1911, came up for consideration by the F.M.S. Court of Appeal in 1919 in *Palaniappa Chetty* v. *Dupire Brothers & Anor.*[2] There it had been decided by the trial judge that a lien under section 80 afforded no security and gave no priority whatever to the holder and that the only advantage which the holder got by his lien was an immediate order of sale of the land.

The F.M.S. Court of Appeal reversed this decision and held that the holder who has complied with section 80 has priority as against unsecured creditors.

Earnshaw J.C. said at pages 372-4:—

"Returning now to the question of the lien and of priority I find that it was decided in the court below that this lien afforded no security and gave no priority whatever to the plaintiff and that the only advantage which the plaintiff got by his lien was an immediate order of sale of the land.

This is equal to a decision in the circumstances of this case that the attaching creditors who have no security of any kind whatever are in as favourable a position as the lien-holder, i.e., they must all share and share alike.

Such an interpretation of section 80 of the Registration of Titles Enactment renders the section absolutely useless, or worse than useless, as its existence might prove a pitfall to many people as, if it stands, it has already done to the plaintiff in this case.

The plaintiff has carefully complied with all the provisions of section 80 and he has become the holder of a lien.

To use the words of the section, a 'lien' has been 'created' in his favour.

To say that a lien gives no security amounts to a contradiction in terms.

A lien is one and a special form of security. In fact 'security' is the genus of which 'lien' is a species. its very meaning, derived as it is through the French from the Latin ligo, ligamen is that of binding or tying or securing something.

In the bankruptcy law the holder of a lien is as well secured as the holder of a mortgage or charge and always ranks as a secured creditor.

To interpret section 80 without giving to the word lien its meaning of security is in my view completely wrong.

At the hearing of the appeal before us the above interpretation of the word 'lien' was not strongly contested.

....

For the above reasons I am of opinion that this appeal should be allowed with costs both here and in the court below as against the two unsecured creditors who have appeared and that it should be declared that the debt of the plaintiff (now appellant) should be paid so far as it is secured by the lien priority of all debts not secured by earlier charge."

Three years later Woodward C.J.C. in *The Registrar of the Supreme Court* v. *Kong Peng Kee & Ors.*[3] gave the same construction.

A year later in 1923 the F.M.S. Court of Appeal again had occasion to consider section 80 and again came to the conclusion that a lien takes priority to an attachment. Farrer-Manby J.C. in *L.R.M. Raman Chetty* v. *K.V.A.L. Muthiah Chetty* [4] said at page 183:—

"In the Court of Appeal in *Palaniappa Chetty* v. *Dupire Brothers* [2] the judges also took the view that section 80 was an exception to enable business men to raise money on loan speedily, and in Civil Suit 350 of 1922 the present learned Chief Judicial Commissioner has taken the same view.

Section 80 is not the only exception in the Enactment. Section 37 allows a lease for three years to be valid without registration.

I think these opinions are correct. The lien-holder is expressly given a right to caveat. He can only caveat if he has an interest in the land — section 70. It follows therefore that section 80 gives him an interest in the land. He therefore has priority over a subsequent attaching creditor who has something on the register which confers no title and gives at most a very limited interest in the land."

It is clear therefore that the plaintiffs' lien has priority over the second defendant's claim.

In my judgment this appeal should be dismissed with costs.

Barakbah L.P. and **MacIntyre F.J.** concurred.

Appeal dismissed.

Solicitors: *Xavier & Thambiah; Chooi & Co.*